



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC. SUIT NO. 647 OF 2016

FADUMO MUHAMUD HERSI.....PLAINTIFF

VERSUS

PATRICK KANGETHE & SONS.....DEFENDANT

RULING

The Plaintiff brought this suit against the Defendant on 14th June 2016 seeking;

- a. A mandatory injunction directed at the Defendant requiring it to restore the Plaintiff into possession of all that premises known as shop No. 1 together with all fixtures and assets contained therein (hereinafter referred to as “the suit property”) being premises situated on land known as L.R No. 36/VII/449
- b. Damages
- c. Costs

In her plaint dated 14th June 2016, the Plaintiff averred that on or about 11th March, 2010, she entered into a lease agreement with the Defendant in respect of the suit property whereby the Plaintiff leased from the Defendant the suit property at an agreed monthly rent of Kshs. 50,000/= and on other terms and conditions which were contained in the said agreement. The Plaintiff averred that on 13th June 2016 the Defendant caused the Plaintiff to be evicted from the suit property without any reasonable or justifiable cause as a consequence of which the Plaintiff suffered loss and damage. The Plaintiff averred that her eviction from the suit property was unlawful in that the same was in breach of the lease agreement between her and the Defendant.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 14th June 2016 seeking a mandatory injunction to reinstate the Plaintiff into the suit property pending the hearing and determination of the application and thereafter the suit. The application came up for hearing before this court ex-parte on 17th June 2016 when the court made the following orders;

1. *“The Notice of Motion dated 14th June 2016 to be served for hearing inter partes on 29th June 2016.*
2. *Until then, there shall be a temporary injunction restraining the Defendant from parting with possession of and/or leasing out the premises known as Shop No. 1 situated on L.R No. 36/VII/449”.*

The Plaintiffs Notice of Motion application dated 14th June 2016 is still pending hearing. What is now before the court is another application by the Plaintiff brought by way of Notice of Motion dated 3rd October 2016. In the application the Plaintiff has sought the following principal prayers;

1. Leave to institute contempt of court proceedings against the Defendant.
2. An order restraining the Defendant from carrying out construction or further construction on the parcel of land known as L.R No. 36/VII/449 pending the hearing and determination of the suit.
3. An order directing the Nairobi County Commissioner of the National Police Service to ensure compliance by the Defendant of the order sought above pending the hearing and determination of the suit.

The application which was supported by the affidavit of the Plaintiff sworn on 3rd October 2016 was brought on the grounds that on 17th June 2016 the court granted an interlocutory injunction restraining the Defendant from parting with possession or leasing out the suit property which order was extended from time to time. The Plaintiff averred that the said order as originally issued and extended was served upon the Defendant's advocates on record on 8th July 2016. The Plaintiff averred that on 28th September 2016, the Defendant demolished the building which was standing on L.R No. 36/VII/339 on which the suit property was situated and commenced the construction of another building on the premises despite the existence of the said order. The Plaintiff averred that the said action by the Defendant amounted to a breach of the said court order and was intended to defeat the Plaintiff's rights. The Plaintiff annexed to her affidavit among others, a copy of the lease agreement dated 11th March 2010 between the parties, affidavit of service of Pamela Shiyoya sworn on 8th July 2016, photographs said to have been taken on L.R No. 36/VII/449 showing the demolition exercise being undertaken on the property by the Defendant and a copy of a letter dated 21st January 2016 addressed to the Defendant by the firm of Shabana Osman & Associates then acting for the Plaintiff.

The Defendants appointed the firm of Ongegu & Co. Advocates to act for them in this matter. They however neither responded to the Plaintiff's application for injunction nor the present application. I have considered the application together with the affidavit filed in support hereof. I have also considered the submissions by the Plaintiff's advocate. As I mentioned earlier in this ruling, the Plaintiff's application has two limbs. The first limb seeks leave to commence contempt of court proceedings against the Defendant while the second limb seeks an order restraining the Defendant from continuing with construction on L.R. No. 36/VII/449. I am of the view that the prayer seeking leave to institute contempt of court proceedings against the Defendant has no basis. The contempt which is alleged to have been committed by the Defendant arose from alleged breach of an order of injunction which was made by this court on 17th June 2016. The Plaintiff's application was brought under Section 5 of the Judicature Act, Chapter 8 Laws of Kenya (now repealed) before the enactment of the Contempt of Court Act, 2016. It is now well settled that under the Contempt of Court Act of England of 1981 and Part 81 of the Civil Procedure (Amendment No. 2) Rules, 2012 which were regulating contempt of court proceedings in the Supreme Court of England which were applicable in Kenya prior to the enactment of the Contempt of Court Act, 2016, leave is not necessary to institute committal proceedings for breach of a judgment or order. The Plaintiff was in the circumstances not required to seek leave of this court before instituting committal proceedings against the Defendant. That finding disposes of the first limb of the Plaintiff's application. The second limb of the application seeks an order restraining the Defendant from constructing or continuing with construction on L.R. No. 36/VII/449. This prayer as I have mentioned earlier is sought on the ground that the acts of demolishing the building on which the suit property was situated and constructing another building amounted to contempt of court. For the court to grant the injunction sought the Plaintiff had a duty of showing that the construction on L.R No. 36/VII/449 was being undertaken by the Defendant and that the same was in breach of the order which was made herein on 17th June 2016. The Plaintiff annexed to her affidavit in support of the application, a copy of a letter dated 21st January 2016 from the Plaintiff's previous advocates complaining about the information which the Plaintiff had received that the Defendant intended to sell L.R No. 36/VII/449. Having received

information that the Defendant intended to sell the suit property, it was necessary for the Plaintiff to confirm that the Defendant was still the owner of L.R No. 36/VII/449 and that it was the Defendant who was carrying out the construction complained of. A search on the title of L.R No. 36/VII/449 would have sufficed for the purposes of ascertaining the ownership of the suit property. There is also no evidence that the construction complained of was being undertaken in breach of a court order. The dispute between the parties herein did not concern the entire parcel of land known as L.R No. 36/VII/449. The dispute was limited to Shop No. 1 (“the suit property”) which was situated on the suit property. The order that was issued by the court restrained the Defendant from parting with the possession of the suit property or leasing out the said property. The order was not directed at the entire parcel of land comprised in LR. No. 36/VII/449. The order did not also restrain the Defendant from demolishing L.R No. 36/VII/449 or carrying out construction on the said parcel of land. Without making any conclusive findings on the issue since I am not considering an application for committal, the much I can say is that I am not persuaded that the construction works sought to be stopped are being undertaken in breach of the court order which was made herein on 17th June 2016. That being my view on the matter, I find no basis for stopping the same.

The upshot of the foregoing is that the Notice of Motion dated 3rd October 2016 has no merit. The same is dismissed with costs to be in the cause.

Delivered and signed at Nairobi this 28th day of June, 2017

S. OKONGO

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the Defendant

N/A Court Assistant